

**Before the
Federal Communications Commission
Washington, DC 20554**

Implementation of the Local Competition)	
Provisions in the Telecommunications Act)	CC Docket No. 96-98
of 1996)	

**Joint Comments of
e.spire Communications, Inc. and
Intermedia Communications Inc.**

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MAY 26, 1999

SUMMARY

e.spire Communications, Inc. and Intermedia Communications Inc. (collectively, the “Joint Commenters”) submit that this proceeding provides the Commission a tremendous opportunity to articulate clearly the technology-neutral underpinnings of Communications Act as the Commission re-visits its initial UNE determinations. The Supreme Court’s January 26, 1999 decision has clarified that this Commission has primary responsibility for ensuring that all telecommunications markets become open to competition and that advanced telecommunications capabilities are deployed to all Americans as rapidly as possible. As data-oriented CLECs, the Joint Commenters are keenly interested in the success of the Commission’s effort, and therefore welcome this opportunity to provide input to the Commission.

One primary goal of the Commission in this proceeding is to breathe new life into the Act’s “necessary” and “impair” standards for defining UNE. The presence of two standards, however, does not suggest that the Commission should consider the impact of its unbundling decisions on competitors’ ability to compete in one instance, but not in the other. Under either standard, the Commission must consider non-ILEC sources and several factors, including at a minimum, the ubiquity, cost, and quality of any non-ILEC UNE.

Turning to UNEs, the Joint Commenters note at the outset that the Commission should re-affirm that ILECs must make UNE combinations available based on the Supreme Court’s analysis in the *AT&T* decision. According to that decision, the ILECs’ unbundling obligation requires ILECs to provide access to UNEs in any technically feasible manner, which includes combinations. Moreover, the Commission’s current rules require ILECs to provide CLECs UNE combinations that ILECs use in their provision of service.

The Commission also should re-affirm that use restrictions on UNEs purchased by CLECs will not be tolerated. The plain language of the Act and Commission decisions permit a CLEC to use UNEs to provide any telecommunications services that a CLEC provides. Moreover, permitting use or service restrictions on UNEs would violate this Commission's strong public policy against making regulatory decisions that would drive the technology choices of the private companies. Any other result would permit the ILECs and potentially state commissions – rather than the marketplace – to dictate CLEC business plans.

As for specific UNEs, the Joint Commenters submit that the Commission should re-promulgate the OSS UNE, as well as all transmission-related UNEs, including the Local Loop, NID, Interoffice Transmission, and Signaling and Call-Related Databases. The Joint Commenters also recommend that the Commission establish an Inside Wiring UNE, and an Enhanced Extended Loop UNE. The Commission also should make clear that the UNEs listed above include any cross-connects needed for connection to other UNEs or collocated equipment. In addition, all UNEs must be available for both traditional circuit-switched services and advanced packet-switched services. The Commission also should take this opportunity to define UNEs specific to packet-switching to encourage the rapid deployment of advanced services, including Frame Relay and ATM.

Finally the Commission should expressly state that section 252's cost-based pricing standard applies to all UNEs and combinations of UNEs. The Commission should indicate that it will foreclose any effort – by ILECs or others – to load UNEs with non-cost-based charges. The Commission should affirmatively conclude that CLECs may convert special access circuits to UNEs without payment of additional charges. ILECs must not be permitted to assess “glue charges” on UNEs. The Commission also should re-affirm that ILECs may not assess

access charges on telecommunication carrier use of UNEs to provide exchange access service, and UNE prices may not include subsidies or embedded access charges.

By taking the steps proposed by the Joint Commenters, the Commission will go a long way toward advancing that state of local competition throughout the nation.

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I. INTRODUCTION AND SUMMARY

The Joint Commenters are facilities-based competitive local exchange carriers ("CLECs") that offer a wide-array of end-to-end data and voice services to business customers. e.spire Communications, Inc. ("e.spire") supplies customers with traditional and advanced telecommunications service through its SONET-based fiber-optic local networks. e.spire provides advanced data, Frame Relay, and Internet service. At this time, e.spire has completed construction of local fiber networks in 35 markets, has installed 22 local exchange switches in the eastern, southeastern, and southwestern United States and also has deployed 66 data switches nationwide. Intermedia Communications Inc. ("Intermedia") provides a full range of telecommunications services throughout the nation. Intermedia offers a variety of advanced

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, Second Further Notice of Proposed Rulemaking* (rel. Apr. 16, 1999) ("FNPRM").

telecommunications services, including asynchronous transfer mode ("ATM"), Frame Relay, integrated services digital network ("ISDN"), and Internet access, over its own data network. To date, Intermedia has deployed over 175 data switches and 20 voice switches throughout the country.

Regarding the "necessary" and "impair" standards, the Joint Commenters concur in the definitions proposed by the Association for Local Telecommunications Services ("ALTS") in its comments. At bottom, the "necessary" standard applies only to elements of incumbent local exchange carrier ("ILEC") networks that are "proprietary," and the "impair" standard applies to all other elements of ILEC networks. Recognizing the sensitivity of disclosing sensitive intellectual property, the Act requires access to proprietary elements only when "necessary."² For non-proprietary network elements, the "impair" standard is invoked.³ Under the "impair" standard, non-proprietary network elements must be made available to a CLEC unless a ubiquitous, interchangeable substitute for the ILEC UNE is available at a comparable price.

The Joint Commenters also submit that the Commission should mandate that UNEs be made available in combination. Technological advances, marketplace developments, and the inherent advantages of ILECs warrant the establishment of such UNE combinations – especially combinations of UNEs over which the ILECs offer advanced services to their end

² 47 USC § 251(d)(2)(A).

³ *Id.* § 251(d)(2)(B).

users. In addition, the Commission should reaffirm that the technology-neutral underpinnings of the Act foreclose state commissions and ILECs from placing use restrictions on UNEs or favoring one market-entry strategy over another.⁴ The principle of nondiscrimination suggests that the Commission should minimize to the extent practicable the degree to which regulation drives the technology or marketing decisions of private companies.

As for specific UNEs, the Joint Commenters submit that the Commission should re-promulgate the operations support system ("OSS") UNE, as well as all transmission-related UNEs, including the Local Loop, Network Interface Device ("NID"), Interoffice Transmission, and Signaling and Call-Related Databases. The Joint Commenters also recommend that the Commission establish an Inside Wiring ("ISW") UNE and an Enhanced Extended Loop ("EEL") UNE.

The Commission should clarify that each of the above-mentioned UNEs includes any cross-connects needed for connection to collocated equipment or for connection to other UNEs. Moreover, UNEs must support traditional circuit-switched applications as well as broadband and packet-switched applications. For example, CLECs need access to high-capacity local loops and transport facilities at the DS3, OC3, OC12, and OCn levels to deliver bandwidth intensive applications to end-users. Similarly, the availability of "clean copper" loops⁵ is a prerequisite to the provision of competitive digital subscriber line ("DSL") services. Access to

⁴ Nor should ILECs be able to impose different performance standards or rates on UNEs depending on the uses to which CLECs put such UNEs.

⁵ "Clean Copper" loops are loops without electronics that have been conditioned for the provision of digital services, including DSL. The conditioning process involves removing loading coils and bridged taps from local loops.

dark fiber loops and dark fiber transport also is critical to the rapid deployment of high-capacity services.

The Commission also should establish several data-specific UNEs to promote the deployment of advanced telecommunications capability, including ports on data switches and routers as well as the associated connectivity between those ports appropriate to the type of packet-switched protocol in use (*e.g.*, Frame Relay, ATM, Internet Protocol ("IP"), etc.). Each of these items is critical to the competitive provision of advanced packet-switched data services.

Lastly, with regard to pricing, the Commission should find that section 252's cost-based pricing standard applies to all UNEs and combinations of UNEs, and foreclose any effort to saddle UNEs with non-cost-based charges. The Commission should affirmatively conclude that CLECs may convert special access circuits to UNEs without payment of additional charges. ILECs must not be permitted to assess "glue charges" on UNEs. The Commission also should require that ILECs make UNEs available at volume and term discounts.

II. THE JOINT COMMENTERS CONCUR IN THE DEFINITION OF THE NECESSARY" AND "IMPAIR" STANDARDS PROPOSED BY ALTS

The Joint Commenters agree with the "necessary" and "impair" standards devised by ALTS. Section 251(d)(2) provides:

In determining what network elements should be made available for the purposes of subsection (c)(3), the Commission shall consider at a minimum, whether –

(A) access to such network elements as are proprietary in nature is *necessary*; and

(B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.⁶

This test distinguishes between proprietary and nonproprietary network elements – access to a proprietary network element is available only where “necessary,” and access to a nonproprietary network element is available if lack of access would “impair” the ability of a CLEC to offer service.

The Commission should construe narrowly the term “proprietary” and consider a network element proprietary only if use of the element by a requesting carrier would: (1) result in the release of customer information that is available solely due to processes or applications developed and implemented exclusively by the ILEC or (2) reveal ILEC-specific methods or processes covered by intellectual property rights and protections, including those available under copyright, patent, and trademark law. An element should be considered “proprietary” only when the proprietary aspects of a network element must be revealed when the particular element is unbundled.

In determining whether unbundling a proprietary network element is “necessary,” the Commission must evaluate whether comparable functionality can be obtained through unbundled access to non-proprietary ILEC network elements, through self-provisioning, or through a non-ILEC source.⁷ However, for a non-ILEC element to be an effective substitute, the

⁶ 47 USC § 251(d)(2) (emphasis added).

⁷ *FNPRM* ¶ 21.

non-ILEC network element may not be one that is just theoretically available, but one that is available in the real world on a widespread basis. In other words, unless the alternative network element could be – and is – substituted in a way that results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market, the non-ILEC alternative is irrelevant to the statutory test, as it does not provide CLECs with a means to compete.

The presence of two standards, however, does not suggest that the Commission should consider the impact of its unbundling decisions on competitors' ability to compete in one instance, but not in the other. Instead, the Joint Commenters suggest that, in applying either the "necessary" or the "impair" standard, the Commission should consider whether a requesting carrier's ability to compete will be materially diminished. If failure to gain access to a "proprietary" UNE would materially impair CLECs from competing (*e.g.*, access to information needed to electronically bond OSS systems), then it would be "necessary" for the CLECs to have access to the item as a UNE.

Under either standard, the Commission must consider non-ILEC sources and several factors, including at a minimum the following:

- (1) Availability – whether a substitute UNE is available with the same ubiquity as the ILEC UNE (*e.g.*, whether the CLEC will have access to a substitute UNE at all interconnection points where CLECs are located – POPs, collocation nodes, etc.);
- (2) Timeliness – whether a substitute UNE may be obtained without significant network reconfiguration and without added "time to market";
- (3) Cost – whether the cost of a substitute UNE approximates the TELRIC rate (including recurring and nonrecurring charges); and

- (4) Quality – whether a substitute UNE is available at terms and levels of quality similar to the ILEC UNE (*e.g.*, provisioning intervals, the ability to obtain without long-term commitments, meeting same industry technical standards, the ability to obtain the same volumes as UNEs etc.).

When these factors are met, the result should be that the substitute is in fact in widespread use by competitors entering the market.

In applying the “necessary” and “impair” standards, the Joint Commenters support the Commission’s tentative conclusion that it “should continue to identify an initial list of network elements that must be unbundled on a nationwide basis.”⁸ In so doing, the Commission should clarify that a “necessary” or “impair” analysis will be used for modifying the national list to add, modify, or remove UNEs. The Joint Commenters recommend that the burden of proof fall on the carrier seeking the change to the national list, be it an addition, modification, or deletion. ILECs most typically will bear the burden of proof in seeking to retire UNEs.⁹ CLECs most typically will bear the burden of proof in attempting to add new UNE. In addition, the Joint Commenters suggest that the Commission continue its practice of allowing state commissions to create new UNEs, but state commissions should not be allowed to take UNEs off of the national list, even for their own state. Such a result would maintain the *status quo* with regard to the establishment of UNEs.

For removing UNEs, parties should be able to file with the Commission a waiver request, which could apply to a specific state, an ILEC region, or the national minimum list. In

⁸ *Id.* ¶ 14.

⁹ A competitive provider of a UNE, of course, could also petition the Commission to remove a UNE from the initial federal list in a given state, ILEC territory, or nationally.

the event that the Commission grants a state-specific waiver, grants an ILEC-specific waiver, or removes a UNE from the national list entirely, the Joint Commenters submit that the CLECs should have the ability to continue purchasing any item in the relevant geographic area in which a UNE is retired: (1) for the period of one year or (2) according to the terms and conditions of interconnection agreements, whichever is longer. Embedded UNEs serving existing customers should be grandfathered to avoid service disruptions and customer inconvenience. ILECs historically have grandfathered services for their retail customers to avoid disruption, and CLECs should have the ability to benefit from this standard industry practice as well.

III. BASED ON THE SUPREME COURT'S ANALYSIS, THE COMMISSION SHOULD REAFFIRM THAT ILECs MUST MAKE UNE COMBINATIONS AVAILABLE

The Commission has recognized that “[t]he ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress’s objective of promoting rapid competition in the local telecommunications market.”¹⁰ The Commission is fully empowered to require ILECs to provide UNE combinations. As the Supreme Court noted, section 251(c)(3) “does not say, or even remotely imply, that elements must be provided [in discrete pieces] and never in combined form.”¹¹ Without combinations, ILECs will have an unfettered ability to impair CLEC provisioning of all telecommunication services, especially advanced services. Thus, in accord with the Supreme Court’s decision, the Commission should affirm that: (1) the ILECs’ section

¹⁰ *FNPRM* ¶ 2.

¹¹ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 737 (1999) (“AT&T”).

251(c)(3) unbundling obligation requires the provision of UNEs in combination and (2) section 51.315(c) of the Commission's rules requires the ILECs to provide EEL combinations¹² to CLECs.

A. The ILECs' Unbundling Obligation, Contained in Section 251(c)(3), Requires ILECs to Provide Access to UNEs in Any Technically Feasible Manner, Including UNEs in Combination

The Commission should reaffirm that ILECs must provide UNEs in combination, if requested to do so by a CLEC. Section 251(c)(3)¹³ of the Act requires ILECs to provide CLECs with unbundled access to UNEs at any technically feasible point, including in combination. The Act endorses no specific technological means of recombination. Rather section 251(c)(3) requires ILECs to provide access to UNEs at any "technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory...."¹⁴ As evidenced by their own provision of service to retail customers, UNE combinations – including the EEL – are technically feasible. Thus, ILEC failure to offer the EEL combination or other combinations would result in exactly the type of discrimination contemplated by section 251(c)(3).

To date, ILECs have maintained that CLECs must use some form of collocation to recombine UNEs for themselves in spite of the fact that nowhere in section 251(c)(3) is the word "collocation" used. Neither collocation (which is provided for in section 251(c)(6)) – nor collocation variants – satisfy the nondiscrimination requirements of section 251(c)(3). Indeed, as

¹² An EEL is a local loop, transport, and in some cases, multiplexing combination.

¹³ 47 USC § 251(c)(3).

¹⁴ *Id.*

the Commission has noted, the ILECs' obligation to provide nondiscriminatory access to UNEs is entirely separate from the ILECs' obligation to offer various forms of collocation:

In enacting sections 251(c)(3) and 251(c)(6), Congress established two separate provisions that impose distinct duties on incumbent ILECs in providing access to their networks. Section 251(c)(6) imposes an obligation on incumbent LECs 'to provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements' Section 251(c)(3) imposes a separate obligation on the incumbent LEC to provide 'nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory.... *Nothing in the language of section 251(c)(3) limits a competing carrier's right of access to unbundled network elements to the use of collocation arrangements. If Congress had intended to make collocation the exclusive means of access to unbundled network elements, it would have said so explicitly.*¹⁵

Because unbundled access and collocation are entirely distinct obligations, whether an ILEC offers collocation in accordance with section 251(c)(6) is wholly unrelated to whether an ILEC offers unbundled access at "any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."¹⁶ Accordingly, because the Commission has found that (1) collocation does not satisfy the requirements of section 251(c)(3)

¹⁵ *Application of BellSouth Corporation, et al. For Provision of In-Region InterLATA Services in Louisiana*, CC Docket No. 98-121, *Memorandum Opinion and Order* ¶ 168 (rel. Oct. 13, 1998). While the Commission's recent collocation order should greatly improve the terms and conditions of collocation, the Joint Commenters maintain that this does not change the fact that nothing in the Act – or the Commission's rules – requires CLECs to collocate to combine elements that the ILEC combines for itself, such as loop and transport.

¹⁶ 47 U.S.C. § 251(c)(3). Indeed, this conclusion is mandated by common principles of statutory construction -- when different "parts of a provision ... use different language to address the same or similar subject matter, a difference in meaning is assumed." *Harmelin v. Michigan*, 501 U.S. 957, 958 (1991).

and (2) ILECs must provide any technically feasible means for accessing UNEs, the Commission must reaffirm that ILECs are required to provide UNEs to CLECs in combined form.

B. Section 51.315(b) of the Commission's Rules Requires the ILECs to Provide EEL Combinations to CLECs

The Commission should reaffirm that section 51.315(b) of its rules mandates that ILECs must make available to CLECs combinations of UNEs that exist in the ILEC network, including the EEL.¹⁷ Section 51.315(b) provides that “[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.”¹⁸ In upholding this rule, the Court stated that unbundled means “to give separate prices for equipment and supporting services.”¹⁹ With that definition in mind, the Court rejected the ILEC view that “the phrase ‘on an unbundled basis’ in [section] 251(c)(3) means ‘physically separated.’”²⁰

For sake of clarity, the Joint Commenters request that the Commission reaffirm that under 51.315(b), ILECs must make available to CLECs combinations of UNEs that the ILECs make available to their end-users, including EEL combinations. In its provision of data services to end-users, ILECs use combinations of loops, transport, and multiplexing to provide

¹⁷ The Joint Commenters note that EEL combinations maintain a bright line between section 251(c)(3), unbundling, and section 251(c)(4), resale, as EEL combinations are not a finished service, but rather a continuous transmission facility that extends from the customer premises to the CLECs switch.

¹⁸ 47 CFR § 51.315(b).

¹⁹ *AT&T Corp.* at 735 (citations omitted)

²⁰ *Id.* (citation omitted).

connectivity. For example, many ILECs (including, Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and U S WEST) provision DSL services – as native DSL or as T1 service over HDSL – and other data services (*e.g.*, Fame Relay and ATM) to their retail end-users using EEL arrangements. These data circuits are the functional equivalent of EELs, and the ILECs' collective refusal to provide similar technically feasible combinations contradicts section 51.315(b) of the Commission's rules as well as the nondiscrimination requirement of section 251(c)(3) of the Act.

In addition, the Joint Commenters note that Bell Atlantic is providing unrestricted DS1-level EELs to AT&T pursuant to the Dedicated Transport provision of the Bell Atlantic/AT&T interconnection agreement in New York, but is refusing to do so for others. Under the Bell Atlantic/AT&T agreement, Dedicated Transport is defined as:

an interoffice transmission path between designated locations to which a single carrier is granted exclusive use. Such locations may include NYNEX central offices or other equipment locations, AT&T network components, or *Customer premises*....²¹

This definition of dedicated transport is functionally identical to the EEL, and pursuant to an arbitration award interpreting this provision,²² Bell Atlantic is converting AT&T special access circuits to Dedicated Transport UNEs, the rates of which have been set at TELRIC by the New York Public Service Commission ("NYPSC"). Bell Atlantic has flatly rejected efforts of Intermedia to exercise its section 252(i) rights to adopt the Dedicated Transport provision of the

²¹ BANY/AT&T Interconnection Agreement § 2.9.5.2 (emphasis added).

²² Bell Atlantic-New York/AT&T Arbitration Award, attached hereto as **Exhibit A**.

Bell Atlantic/AT&T interconnection agreement.²³ The net result is that Bell Atlantic is using this interconnection agreement to favor AT&T at the expense of other competitors.

The Act does not stand for the proposition that ILECs may discriminate in favor of themselves or in favor of certain competitors in the provision of UNEs or UNE combinations, including the EEL and EEL analogs. To counteract this unlawful discrimination, the Joint Commenters submit that the Commission should reaffirm that ILECs must provide the EEL combination to all requesting CLECs.

IV. THE COMMISSION SHOULD REAFFIRM THAT ILECS MAY NOT PLACE RESTRICTIONS ON UNES

In accordance with the technology-neutral underpinnings of the Act, the Commission should clarify that neither ILECs nor state commissions may place use restrictions on UNEs purchased by CLECs or apply different performance standards to UNEs based on the service purchased by a CLEC customer. Any such use or performance standard restriction on UNEs violates the Act, existing Commission rules, and sound public policy.

A. The Plain Language of the Act and Commission Decisions Permit a CLEC to Use UNEs to Provide Any Telecommunications Services that the CLEC Chooses to Provide

In establishing the access standards for UNEs, Congress directed the Commission to consider whether “the failure to provide access to such network elements would impair the

²³ See February 23, 1999, letter from Jeffrey A. Masoner, Vice President, Bell Atlantic Network Services, to Jonathan E. Canis, attached hereto as **Exhibit B**, denying Intermedia’s request to adopt the Dedicated Transport provision of the BANY/AT&T Interconnection Agreement.

ability of the *telecommunications carrier seeking access to provide the services that it seeks to offer*.²⁴ Similarly, the Act's unbundling requirement directs ILECs "to provide to any requesting telecommunications carrier *for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis."²⁵ In other words, the 1996 Act makes clear that CLECs have the discretion to determine which services they provide over UNEs purchased from ILECs.

The Commission's rules and orders have consistently supported the view that use restrictions on UNEs are inappropriate, except in extremely limited circumstances. Under the Commission's rules implementing section 251(c)(3), the Commission declared that:

An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner that the requesting telecommunications carrier intends.²⁶

Moreover, the Commission has noted that "[t]he only limitation that the statute imposes on the definition of a network element is that it must be 'used in the provision of a telecommunications service.'"²⁷ Furthermore, "'access' to an unbundled network element refers to the means by which requesting carriers obtain an element's functionality in order to provide a

²⁴ 47 USC § 251(d)(2)(B) (emphasis added).

²⁵ *Id.* § 251(c)(3) (emphasis added).

²⁶ 47 CFR § 51.309(a)

²⁷ *Implementation of the Local Competition Provisions in Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) ¶ 261 ("Local Competition First Report and Order" (citations omitted)).

telecommunications service.”²⁸ Thus, as a general rule, the Commission has found that use restrictions on UNEs are not permitted.

Except for one narrow exception,²⁹ neither the Act nor the Commission’s rules permit any restrictions on a CLEC’s ability to choose which services will be provided over CLEC-purchased UNEs or UNE combinations. Any restriction that would dictate or define a minimum list of services that a CLEC must provide (*e.g.*, local dial tone or primarily local service), risks foreclosing new, innovative service providers from using UNEs to deploy the advanced telecommunications services that are now becoming available.³⁰ Some examples of these services include:

²⁸ *Id.* ¶ 269.

²⁹ While the Commission has generally foreclosed use restrictions on UNEs, one exception exists related to unbundled local switching. In its *Local Competition Reconsideration Order*, the Commission found that “[a] requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 13042, ¶ 13 (1996). Again, this applies only to carriers that purchase local switching.

³⁰ On March 18, 1999, the FCC adopted an order establishing national standards for collocation and initiating a new proceeding to establish rules involving the provision of unbundled loops and other UNEs to CLECs for the purposes of providing data services, including “line sharing.” FCC News Release, *FCC Adopts Rules to Promote the Deployment of Advanced Telecommunications Services* (CC Docket No. 98-147)” Line sharing involves the use of a single unbundled local loop by two carriers – one provides data services, while the other provides voice services. The Commission tentatively concluded that such line sharing is technically feasible, and has solicited comments on the rules it should adopt to implement such sharing. While the Commission’s ruling that line sharing is technically feasible is only a tentative conclusion, it necessarily implies that CLECs have the right to use an unbundled loop to provide only data service, apart from voice service.

- Frame Relay services used to connect Local Area Networks or Intranets. These are data applications used over lines that are separate and distinct from those used by the customer for its voice telephony.
- High-capacity Internet access. The "Data CLECs," such as the Joint Commenters, seek to provide this service, even to customers that obtain their voice telephone service from ILECs or other carriers.
- Voice over data applications. Many CLECs, including data-centric CLECs, such as the Joint Commenters, are developing packetized voice services that can be provided over Frame Relay, ATM, or Internet Protocol ("IP"). The FCC has recently issued orders finding that dedicated ADSL-based lines that carry traffic to Internet Service Providers ("ISP")³¹ and dial-up connections to ISPs³² are jurisdictionally interstate.

Similarly, Frame Relay and ATM are primarily interstate, but can and do carry local traffic. A restriction that CLECs may only use EELs or other UNEs to provide predominantly local exchange service would prevent CLECs from providing these and other critically important new services. As noted, the Act is technology neutral, and the Commission has wisely adopted a strong presumption against regulatory decisions that would drive technology."³³ The Commission should continue this course, and reaffirm that any service or use restrictions on UNEs are presumptively invalid.

³¹ *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order*, CC Docket No. 98-79 (rel. Oct. 30, 1998).

³² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket No. 96-98 (rel. Feb. 25, 1999).

³³ *Federal-State Joint Board on Universal Service, Report to Congress*, CC Docket No. 96-45, ¶ 98 (rel. Apr. 10, 1998).

B. Use or Performance Standard Restrictions Violate Sound Public Policy by Discriminating Against Certain Types of Competitors

The Communications Act was designed to be technology neutral, such that market forces, rather than regulatory distinctions would drive the advancement of the nation's communications infrastructure. In the words of the Commission, "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."³⁴ It is vital in this proceeding that, in adopting a nationwide list of UNEs, that the Commission make extremely clear that any sort of use restrictions on UNEs will simply not be tolerated. This is particularly critical because some state commissions and ILECs continue to take the position that they may restrict CLEC use of UNEs, or apply different performance standards to the same UNE depending on what service a CLEC customer uses.³⁵

³⁴ *Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order, ¶ 11.

³⁵ As an example, the Joint Commenters note that the NYPSC has permitted Bell Atlantic-New York ("BA-NY") to restrict CLEC access to loop, multiplexer, and transport combinations (known as the "EEL") to circuit-switched POTS service or to low-speed ISDN-BRI service. These use restrictions have resulted in two forms of discrimination against data-oriented CLECs: (1) discrimination by the ILEC in its provision of services (e.g., xDSL loops) to itself and (2) discrimination by the ILEC regarding the terms and conditions of the availability of loops for circuit-switched and packet-switched services. These restrictions favor circuit-switched providers over providers that use packet-switching technology. Not only does this violate the technology-neutral underpinnings of the Act, but it risks permitting a regulatory regime – rather than consumer demand – to drive the technology choices of telecommunications service providers in New York. The restrictions currently in place on the EEL in New York are purely based on technology, and therefore should be rejected as contrary to longstanding Commission public policy.

The Joint Commenters respectfully request that the Commission reaffirm that CLECs may use UNEs to provide any telecommunications service that a CLEC wishes to offer. Moreover, the same performance standards must apply to a UNE regardless of how it is used by a CLEC. Any other result would have the ILECs and regulators – not the market place – pick competitive winners and losers.

V. IN APPLYING THE “NECESSARY” AND “IMPAIR” STANDARDS, THE COMMISSION SHOULD ADOPT A FUNCTIONAL APPROACH TO DEFINING UNES, CLARIFY THE DEFINITIONS OF SEVERAL PREVIOUSLY CREATED UNES, AND ESTABLISH NEW UNES CRITICAL TO THE DELIVERY OF ADVANCED DATA SERVICES

The Commission should expressly adopt a functional approach in defining UNEs. In so doing, the Commission also should re-promulgate its existing rule defining OSS as a UNE. The Commission should expand the definitions of several of the Commission’s original UNEs. In addition, the Commission should establish several new UNEs, to prevent the impairment of CLECs providing data services.

A. The Commission Should Expressly Adopt A Functional Approach In Defining UNEs.

In an effort to break up the network into as many separate physical pieces as possible, ILECs have maintained that the Act’s unbundling rules require the Commission to define UNEs as discrete physical items.³⁶ However, the definition of “network element” in the

³⁶ See, e.g., *AT&T Corp.* at 735 (rejecting the ILECs’ argument that the term “network element” refers only to discrete physical facilities).

Act indicates that Congress intended the Commission to employ a broad, functional approach to defining UNEs:

The term ‘network element’ means a facility or equipment used in the provision of telecommunications service. *Such term also includes features, functions, and capabilities that are provided by means of such functions, and capabilities that are provided by means of such facility or equipment*, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service.³⁷

Interpreting this definition, the Supreme Court commented that “it is impossible to credit the incumbents’ argument that a ‘network element’ must be part of the physical facilities and equipment used to provided local phone service.”³⁸

The Eighth Circuit Court of Appeals supported a functional approach to UNEs, even in cases where one UNE was essentially a combination of functions performed by multiple UNEs. In the *Shared Transport Decision*, the Eighth Circuit found that the statutory definition of network element expressly “includes both individual network facilities and the functions which those facilities provide, *either individually or in consort*.”³⁹ The Eighth Circuit elaborated that, “[p]ursuant to section 251(d)(2) [of the Act], it is within the authority of the FCC to

³⁷ 47 USC § 3(29) (emphasis added)

³⁸ *AT&T Corp.* at 735.

³⁹ *Southwestern Bell Telephone et. al v. FCC*, 153 F.3d 597, 606 (8th Cir. 1998) *petition for cert. filed*, 67 USLW 3561 (Feb. 26, 1999) (No. 98-1381) (“*Shared Transport Decision*”).

determine which of these network elements – *the facilities, the functions, or both* – incumbent LECs must make available on an unbundled basis.”⁴⁰

The broad, functional standard for network elements, has, at least implicitly, already been adopted by the Commission. For example, the Commission has defined local loop as UNE as “a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end-user customer premises.”⁴¹ This effectively is a broad, functional description that incorporates discrete functions of separate elements – NID (which is defined as a UNE itself), distribution cable, concentrator, and feeder cable – into a single UNE. In sum, the Commission has authority to define UNEs by function, and the Joint Commenters submit that it should expressly do so here to minimize regulatory uncertainty.

B. The Commission Should Reaffirm Its Existing OSS UNE and Create a Broad Set of Transmission-Related UNEs to Promote Voice and Broadband Competition.

As ALTS discusses in its comments in this proceeding, most of the UNEs defined by the Commission in the *Local Competition First Report and Order* are of critical importance to CLECs and satisfy any reasonable interpretation of the “necessary” and “impair” standards for unbundling. This is especially true for OSS and transmission related UNEs. Thus, the Joint Commenters submit that the Commission should re-promulgate its existing OSS UNE. Using

⁴⁰ *Id.* (emphasis added). In the *Shared Transport Decision*, several ILECs challenged the Commission’s shared transport UNE on grounds that: (1) the Commission has “no power to aggregate” ILEC transmission facilities into “a single network element”; and (2) the Commission’s shared transport UNE was so broadly defined that it obliterated any meaningful distinction between unbundled access to UNEs (section 251(c)(3)) and total service resale (section 251(c)(4)). The Eighth Circuit rejected both of these arguments. Moreover, the Joint Commenters note that the Local Loop itself is an aggregate of the NID and Loop.

existing UNE definitions as a starting point, the Commission should define a series of transmission-related UNEs, including the Local Loop, NID, Interoffice Transport, Signaling and Call-Related Databases, ISW, and the EEL.⁴² Each of these UNEs is discussed in the paragraphs that follow.

1. OSS

The Joint Commenters support the Commission's existing definition of OSS. In the *Local Competition First Report and Order*, the Commission noted that ILECs "argue that there are proprietary interfaces used to access [OSS] databases and information"; however, the Commission did not make a finding as to whether OSS qualifies as a proprietary network element.⁴³

Even if the Commission were to determine that OSS is proprietary, the Joint Commenters firmly believe that it would meet the "necessary" standard included herein. Indeed, the Commission has noted that "it is absolutely necessary for competitive carriers to have access to [OSS] functions in order to successfully enter the local market."⁴⁴ This is so because, if

(...continued)

⁴¹ 47 CFR § 51.319(a).

⁴² The Joint Commenters submit that the Commission should define the EEL as a UNE *in addition to* defining the EEL as a combination. Gaining access to EELs is critical to CLECs, and by defining the EEL both as a combination as a distinct element, the Joint Commenters believe that the Commission will minimize regulatory mischief.

⁴³ *Local Competition First Report And Order*. ¶ 521.

⁴⁴ *Id.*

CLECs do not have access to the ILECs' OSS functions "in substantially the same time and manner that an incumbent can for itself, competing carriers [would] be severely disadvantaged, if not precluded altogether, from fairly competing."⁴⁵ The Joint Commenters' frustrating experience with ordering and provisioning loops, transport, and other UNEs under their interconnection agreements bears this out. Thus, even if OSS were considered proprietary, it would satisfy the "necessary" test for UNEs.

2. Local Loops

The Joint Comments fully concur with the Commission's "strong expectation" that under any reasonable interpretation of the "necessary" and "impair" standards of section 251(d), the local loop [should] be subject to the unbundling obligations of Section 251(c)(3).⁴⁶ CLEC access to the Local Loop is fundamental to competition. Congress expressly recognized the importance of access to the Local Loop as a means of fostering competition by including "unbundled loops separate from switching" in the section 271 competitive checklist.⁴⁷ By any reasonable conception, the Local Loop must be included in the list of network elements subject to Section 251(d)(2).

The Commission defines the Local Loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises."⁴⁸ The Joint Commenters submit that this is an appropriate, technology-

⁴⁵ *Local Competition First Report and Order*, ¶ 522.

⁴⁶ *FNPRM*, ¶ 32.

⁴⁷ 47 U.S.C. § 271(c)(2)(B)(iv).

⁴⁸ 47 CFR 51.319(a).

neutral definition of the Local Loop; however, the Commission should clarify that the Local Loop also includes:

1. High-capacity loops – copper or optical facilities at the DS1, DS3, and OCn levels,
2. “Clean Copper” loops – copper transmission facilities to an end-user’s premises conditioned to permit transmission of digital services (including DSL) without electronics,
3. Dark fiber loops – optical transmission facilities to an end-user’s premises without electronics, and
4. Any cross-connects between loops and either other UNEs or collocated equipment.

In the *Local Competition First Report and Order*, the Commission found that Local Loops are not proprietary,⁴⁹ and therefore an “impair” analysis is appropriate. No reasonable substitute for ILEC Local Loops (including high-capacity, clean copper, and dark fiber loops) exists, and ILECs are the only providers with ubiquitous Local Loops in their service territories. As for cross-connects, no ILEC substitute exists, and without cross-connects, Local Loops completely lack functionality. Thus, the Local Loop and any necessary cross-connects meet the “impair” standard described herein, and thus should be defined as a UNE on the Commission’s national list.

3. NID

The Commission should reaffirm the availability of the NID pursuant to the “impair” standard of section 251(d). In the *Local Competition First Report and Order*, the

⁴⁹ *Local Competition First Report and Order* ¶ 389.

Commission found that “the record contains no evidence of proprietary concerns with unbundled access to the NID,”⁵⁰ and no reason exists to review this finding. The Commission defines the NID as “as a cross-connect device used to connect loop facilities to inside wiring,”⁵¹ and the Joint Commenters support this definition.

Regarding the “impair” analysis, the Joint Commenters note that access to the NID is nearly as critical as access to the Local Loop. Because NIDs are dedicated to specific customers, alternatives are not available on a wholesale basis, and self-provisioning is impractical with any type of ubiquity. In addition, a customer’s NID is typically the means through which ISW facilities are accessed, and without access to the ILEC NID, a competitor could lack access to a customer. Accordingly, under the “impair” standard presented herein, the Commission should retain the NID as a distinct UNE.

4. Interoffice Transport

The Joint Commenters believe that the Commission should reaffirm and expand the definition of Interoffice Transport under the “impair” standard. Interoffice Transport by no means qualifies as “proprietary.” Access to interoffice transmission facilities is critical to new entrants seeking to enter local markets, and Congress recognized this by including “local transport” in the section 271 competitive checklist.⁵² As the Commission has indicated, “[a]n

⁵⁰ *Id.* ¶ 393.

⁵¹ 47 CFR § 51.319(b)(2).

⁵² 47 USC § 271(c)(ii)(B)(v).

efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities.”⁵³

Moreover, lack of an Interoffice Transport UNE would further impede the spread of competition even in top-tier cities (not to mention second and third-tier cities and suburban and rural areas). To the extent that competitive Interoffice Transport is available at all, this is only true in the largest central offices within the largest cities (even here, existing transport facilities are primarily dedicated to interexchange carriers). Without an Interoffice Transport UNE, CLECs first order of business would be to construct new Interoffice Transport to obtain ubiquitous connectivity in first-tier cities to augment any currently available competitive Interoffice Transport. Only after obtaining the connectivity needed in first-tier cities would CLECs have the opportunity to further develop transport in other markets. In short, without an Interoffice Transport UNE, CLEC expansion would be impaired substantially, as would the development of competition.

In re-promulgating the Interoffice Transport UNE, the Joint Commenters recommend that the Commission clarify that Dark Fiber transport is included in the definition of Interoffice Transport. While the Commission previously found that it lacked an adequate record upon which to identify Dark Fiber transport as a UNE,⁵⁴ many state commissions have defined Dark Fiber as a UNE, suggesting that Dark Fiber satisfies any reasonable “impair” analysis.⁵⁵

⁵³ *Local Competition First Report and Order* at ¶ 440.

⁵⁴ *Id.* at ¶ 450.

⁵⁵ For example, Dark Fiber is available in Texas, Oregon and Washington.

Thus, the Joint Commenters recommend that the Commission adopt Dark Fiber as part of the national interoffice transport UNE.

5. Signaling and Call-Related Databases

In the *Local Competition First Report and Order*, the Commission recognized that access to signaling links, signaling transfer points, and call-related databases (such as the LIDB, Toll Free Calling, and AIN databases, as well as the Service Management Systems) is critical to entry into the local markets and to the ability of new entrants to compete with incumbents on a comparable basis.⁵⁶ Indeed, the importance of signaling systems and related databases is reflected in section 271, which requires BOCs to make these items available on a nondiscriminatory basis as a precondition to entry into the in-region interLATA services market.⁵⁷

The Commission already has found that Signaling and Call-Related databases are not “proprietary” because “SS7 signaling networks adhere to Bellcore standards, rather than LEC-specific protocols....”⁵⁸ Moreover, “[b]ecause alternative signaling methods, such as in-band signaling, would provide a low quality of service, [the Commission concluded] that a competitor’s ability to provide service would be significantly impaired if it did not have access to incumbent LEC’s unbundled signaling links and STPs.” Thus, a Signaling and Call-Related Database UNE would satisfy the “impair” standard.

⁵⁶ *Local Competition First Report and Order*, ¶¶ 478-79.

⁵⁷ 271.

⁵⁸ *Id.* at ¶ 481.

6. ISW (Inside Wiring)

The Joint Commenters urge the Commission to adopt ILEC-owned ISW as a new UNE. ISW, which includes horizontal and vertical house and riser cables, is the segment of transmission closest to a customer premises. To date, ILEC-controlled ISW has been a fundamental bottleneck to the deployment of competitive telecommunications service to multi-tenant establishments ("MTE"), and the Joint Commenters strongly commend the Commission's recognition of ISW in the *FNPRM*.⁵⁹

Because ISW is not a "proprietary" UNE, the Joint Commenters submit that the Commission should analyze access to ISW under the "impair" standard. Wherever it is deployed, no substitute exists for ILEC-controlled ISW. Self-provisioning is nearly impossible in already crowded conduit spaces within buildings. Moreover, the Joint Commenters note that several ILECs, including Bell Atlantic, BellSouth, and US WEST presently offer ISW, and thus provisioning this UNE is technically feasible.⁶⁰ Because access to ISW is of fundamental importance to CLECs attempting to provide service to MTE, the Commission should adopt ISW as a national UNE in this proceeding.

⁵⁹ *FNPRM* at ¶ 33.

⁶⁰ BellSouth makes inside wire available on an unbundled basis through interconnection agreements it has entered into with CLECs in Georgia, Florida, Kentucky and Tennessee; U S WEST is required to provide unbundled access to inside wire in Nebraska; and Bell Atlantic is required to provide unbundled access to house and riser cables in New York.

7. EEL

Finally, the Joint Commenters submit that the Commission should identify the EEL as a UNE, in addition to a required combination. As a practical matter, an EEL is a facility that would give CLECs access to the local loop functionality of an ILEC. Rather than forcing a CLEC to adopt the outdated distributed central office architecture of the ILEC, an EEL in effect would bring an end user's loop to a CLEC's local switch or point of collocation. Along the path to the CLEC's point of interface, EELs would be aggregated utilizing modern multiplexing technology. Once delivered to the CLEC, EELs are dependent upon the CLEC providing its own switching functionality. In this manner, an EEL represents a functional end-user "loop" connected to a CLEC switch.

The Commission has clear legal authority to define UNEs by function, including an EEL UNE. In *AT&T*, the Supreme Court found that the broad scope of the definition of "network element" included functions as well as facilities.⁶¹ As noted earlier, the Eighth Circuit Court of Appeals has found that the statutory definition of network element expressly "includes both individual network facilities and the functions which those facilities provide, *either individually or in consort.*"⁶²

⁶¹ *AT&T* at 733. ("Given the breadth of [the definition of network element], it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provide local phone service.")

⁶² *Shared Transport Decision*, 153 F.3d at 606. (emphasis added).

Defining the EEL as a single UNE also would ensure that CLECs may purchase EELs at the cost-based rates of the underlying components, as required by section 252(d) of the Act. Without an EEL UNE, ILECs in all probability will attempt to assess glue charges or similar non-cost-based-charges on EEL combinations, which would impair CLECs by artificially raising their costs. Moreover, without an EEL UNE, ILECs might not provision these transmission facilities at all. Defining the EEL as a UNE would avoid such a result.

C. The Commission Should Adopt UNEs Necessary For Providing Competitive Packet-Switched Data Services

The Joint Commenters have expended substantial time and resources in attempting to negotiate or arbitrate arrangements to interconnect their data networks with those of ILECs. In this effort, the Joint Commenters have met with only partial success – interconnection agreements established to date have been limited to certain states, and in some cases apply only to jurisdictionally intrastate frame relay traffic, limiting their utility to CLECs to something far less than that contemplated by section 251(c)(2) of the Act. These experiences negotiating with ILECs regarding the opening of their data networks make clear that the Commission should (consistent with the section 251(d)(2) standards for network unbundling and with the section 706 mandate, encourage the deployment of advanced data services) establish a series of UNEs specifically geared to the expansion of CLEC data networks.

Packet-switched networks do not follow the same hierarchical switching structure as ILEC circuit-switched networks, in which end-users are connected to each other through circuits dedicated, for the duration of communications, to those communications. Instead, a data

customer is connected to a distributed network of interconnected data switches and/or routers and transport links. This network is called a "cloud" because a customer's data transmissions are disassembled into numerous data packets prior to transmission. In a single transmission, the data may transit multiple data switches (in the case of Frame Relay and ATM) or routers (in the case of IP), which provide a variety of functions, including aggregating, hubbing, routing, and switching. Packets, which constitute a single transmission, may travel along a myriad of differing paths within this "cloud" to reach the ultimate point of termination, none of which is, at any point in time, dedicated to the communication as in the circuit-switched network. Rather, each part of the "cloud" may, and typically does, support packets from a large number of transmissions simultaneously. In addition, in order to provide the redundancy and alternate transmission paths that allow the most efficient routing, data carriers often interconnect their networks at multiple points. The net result of these features is that data networks achieve considerable efficiencies over circuit-switched networks for the type of bursty, data communications for which they designed.

In many but by no means all cases, established UNEs will provide the network elements that competitive carriers require to support the provision of data services. However, even if dedicated high capacity transport at DS1, DS3 and OCn speeds, and digitally conditioned copper loops or high speed loops, are available as UNEs, competitive carriers will be impaired in their provision of data services unless they also have access to the efficiencies that are offered by the connectivity between points within the distributed data networks of ILECs. ILECs can piggyback upon their existing network architectures, exploiting the distribution of central offices and interoffice transport capacity, to deploy a distributed, efficient packet-switched networks

with markedly fewer obstacles than CLECs. Thus, ILECs must unbundle functions that are unique to data networks, and new data UNEs must be established.

The overarching function required as a UNE by data carriers essentially provides connectivity between switching, hubbing, or routing nodes on an ILEC data network. This can involve connectivity between a data switch or router that serves an end-user and a data switch or router that serves other carriers; or connectivity between data switches or routers that serve carriers. These functions typically are reflected by several rate elements in ILEC Frame Relay and ATM cell relay service tariffs, although the terminology varies dramatically from ILEC to ILEC. The functions, however, are essentially the same – the establishment of virtual circuits between and including ports on data switches or routers. Whether this connectivity is called a “Logical Link,” a “Private Network Link,” or some other term, the ILEC provides a virtual circuit defined at a specific bit rate that includes and connects two data switch or router ports. The Joint Commenters ask the Commission to order ILECs to make available on an unbundled basis (1) the ports on their data switches or routers and (2) the connectivity (including the switching fabric and associated software functions) between such ports. This connectivity should be available at a series of pre-defined committed information rates. Specifically, the connectivity should be available at: 8, 16, 32, 56 and 64 kbps, every increment of 56, or 64 kbps through 1.544 Mbps, and at appropriate intermediate increments through the DS3 level.⁶³ The port UNEs should be available initially at the following speeds: DS0, nxDS0, DS1, and DS3.

⁶³ US WEST, for example, in its current tariff makes rate elements that incorporate the UNI and NNI available at 56 or 64 kbps, 112 or 128 kbps, 168 or 192 kbps, and numerous other intermediate levels below 1.544 Mbps, rather than just 56/64 kbps and 1.544 Mbps.

The rates for these UNEs may vary (*e.g.*, a port on an ATM switch may have a different TELRIC price than a port on an IP router).⁶⁴

These data UNEs do not provide a CLEC with proprietary information, software or hardware. Accordingly, the “necessary” test does not apply. The requested UNEs meet the “impair” test. In conjunction with their own packet switches and other facilities, competitive data service providers will be able to connect these new UNEs with loops and transport – either their own, ILEC provided, or purchased from a third-party vendor – to complete virtual circuits. These new data UNEs in combination with loops, transport and possibly other UNEs will obviate the need for CLECs instantly to deploy facilities to an area comparable to that of the ILECs’ distributed data networks. Data CLECs will be able to utilize the efficiencies uniquely offered by these new UNEs to help usher in robust competition in the advanced data services market. Without the availability of these data UNEs, CLECs in all cases will be forced to back haul unbundled loops to their own data switches on dedicated transport facilities, which are less efficient for purposes of data transmission. The difficulties that CLECs have had in extending

⁶⁴ The Commission should make clear that TELRIC pricing of the requested connectivity UNE must reflect the ability of carriers to oversubscribe the committed information rate of their data facilities. In other words, because the connectivity within a given virtual circuit within the packet-switched network is being used only a fraction of the time, the total committed information rate of all virtual circuits “loaded” onto a facility may be several times that of the facility itself. Thus, PVCs totaling three (or more) times 1.544 Mbps might be “loaded” onto a DS1 facility, maximizing the utilization of the data facility and drastically reducing data network costs. The Joint Commenters submit, based on their own experience in designing data networks, as well as their discussions with the ILECs with whom they have interconnected, that the Commission adopt a rule creating a rebuttable presumption that ILEC facilities are designed to accommodate 300 percent oversubscription. Parties may rebut the presumption to and justify higher or lower oversubscription rates.

their data services through interconnection arrangements cannot be overcome through the provision of reasonably available and economic substitutes for these UNEs because none exists.

The data UNEs requested herein are not exhaustive. As data networks and their technologies develop further, it may be necessary to expand the list of data UNEs or further unbundle the connectivity described herein to prevent competitive providers from being impaired in their provision of services. The Commission should make clear in its Order in this proceeding that it remains open to expanding the list of data UNEs as appropriate to encourage the development of competitive advanced communications services.

As noted above, the Joint Commenters have encountered some ILEC attempts to limit the use of Frame Relay interconnection agreements – and proposed Frame Relay UNEs – to intrastate services only. Such a restriction would, of course, improperly prohibit the use of Frame Relay UNEs (any other digital UNEs) to provide whatever telecommunications service the CLECs deem appropriate, including interstate service.⁶⁵

VI. THE COMMISSION SHOULD REITERATE THAT ITS UNE PRICING STANDARDS APPLY TO ALL UNES AND THAT HIDDEN OR DUPLICATIVE CHARGES WILL NOT BE TOLERATED

The Supreme Court unequivocally upheld the Commission's authority to define the pricing methodology used by state commissions in setting rates for UNEs.⁶⁶ Pursuant to that authority, the Joint Commenters submit that the Commission should reaffirm in this proceeding

⁶⁵ *Local Competition First Report and Order* at ¶¶ 15, 545, 598-99. The same holds true for Internet service.

⁶⁶ *AT&T Corp.* at 733.

that the TELRIC-pricing standards it has adopted apply to all UNEs. In so doing, the Commission should make clear that additional, duplicative, or hidden charges or subsidies are impermissible. Moreover, the Commission should articulate rules permitting volume and term discounts for UNEs where justified under TELRIC.

A. Conversion from Special Access to UNEs Must Be Free of Additional Charges

Many CLECs, including the Joint Commenters, have been forced to purchase special access circuits in order to obtain reasonable deployment intervals for facilities theoretically available as UNEs under interconnection agreements, but plagued by ILEC provisioning delays. This is especially true for high-capacity loops, including DS-1s. CLECs should not be penalized for the ILECs' inability (or refusal) to install UNEs in accordance with their statutory and contractual obligations. Accordingly, the Commission should adopt rules requiring ILECs to convert special access circuits to equivalent UNEs (or UNE combinations) after approval of an interconnection agreement between the CLEC and ILEC. Carriers with existing interconnection agreements must also be able to convert special access without penalty where CLECs have purchased special access to avoid unreasonable ILEC provisioning delays.

The Commission's "all elements rule" prevents ILECs from separating already combined elements, including elements that make up analogous special access circuits.⁶⁷ In endorsing this rule, the Supreme Court noted that, without such a rule, "incumbents could impose wasteful costs on even those carriers who requested less than the whole network."⁶⁸

⁶⁷ 47 CFR § 51.315(b).

⁶⁸ *AT&T Corp.* at 735.

Existing special access circuits without question already are established, and thus ILECs are obligated to make these conversions.

The Commission should also clarify that special access-to-UNE conversions must be seamless. When Intermedia informed Bell Atlantic of its desire to convert its special access circuits to UNEs, Bell Atlantic stated that it would not simply re-price the existing circuit. Rather, Bell Atlantic would disconnect the special access circuit and re-establish a UNE circuit. According to Bell Atlantic's proposal, Intermedia would be responsible for all service disconnection charges on the special access circuit and installation charges on the UNE circuit. Such a process directly contradicts the Commission's "all element" rule, which was designed to prevent "incumbent LECs from 'disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'"⁶⁹ At bottom, the Commission should clarify that a special access-to-UNE conversion is nothing more than a billing change and that ILECs may not impose service disruptions or additional charges on CLECs requesting such conversions.⁷⁰

On a related point, under federal and state rules, CLECs presently are required to show either a 100% or 0% PIU on data circuits, even though these circuits typically handle mixed traffic. Moreover, it is essentially impossible to estimate accurately the ultimate

⁶⁹ *Id.* at 735 (quoting the Commission's reply brief).

⁷⁰ In the AT&T /Bell Atlantic Arbitration Award, the Arbitrator notes that the parties stipulate to several important facts, including the fact that converting a special access circuit to a UNE would "require no change in the Circuit nor any change in the manner in which messages are transmitted through the current physical interconnection...." Moreover, the parties agreed that the conversion issue "is solely about the rate AT&T must pay [Bell Atlantic] for the service provided by the Circuit." AT&T/Bell Atlantic Arbitration Award at 2, attached hereto as **Exhibit B**.

destination of traffic travelling on data networks. In short, the existing PIU system simply does not work for packet-based traffic, and the Commission should use this opportunity to clarify that the PIU system has no place in the packet-switched world.

B. The Commission Should Not Permit “Glue” Charges on Top of TELRIC-Based Cross-Connect Charges

The Commission must clarify that where CLECs request UNEs in combination, ILECs may not impose “glue” charges – either recurring or nonrecurring – in addition to TELRIC cross-connection charges. The imposition of non-cost-based glue charges on UNEs without question contradicts the forward-looking pricing standard established by the Commission. To this end, as noted earlier, the Commission should clarify that costs for cross-connects must be included in the underlying transmission facility rate (either loop or transport), as such items are an integral part of the transmission provided by such UNEs.

C. The Commission Should Reaffirm that Access Charges Do Not Apply When Telecom Carriers Use UNEs to Provide Competitive Service

Previously, the Commission has found that CLECs using UNEs (or interconnection) to compete against ILEC access services do not pay access charges, and the Commission should reaffirm that decision here. In the *Local Competition First Report and Order*, the FCC specifically rejected ILEC arguments that CLECs purchasing UNEs must continue to pay access charges:

We reject the argument advanced by a number of incumbent LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay access charges.... When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access “services.” They are purchasing a different

product, and that product is the right to exclusive access or use of an entire elements.⁷¹

* * *

We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, *infra*, for a temporary period.⁷²

The temporary exception discussed in this last statement expired in 1997.⁷³

Moreover, under the FCC's rules, access charges never applied to carriers purchasing UNEs other than unbundled switching. In reestablishing the nationwide minimum list of UNEs, the Commission should reaffirm that access charges do not apply to competitive providers of exchange access.

D. The Commission Should Reaffirm that its Pricing Rules Exclude Subsidies and Embedded Access Charges

The Joint Commenters request that the Commission take this opportunity to reaffirm that its pricing standard excludes subsidies and embedded access charges. Interpreting the "based on cost" standard of section 252(d)(1), which applies to both interconnection and UNEs, the Commission endorsed the application of a TELRIC cost model.⁷⁴ As noted, the FCC's ability to set this costing methodology as a standard that must be adopted by state

⁷¹ *Local Competition First Report And Order* at ¶ 358. See also *id.* at ¶ 191.

⁷² *Id.* at ¶ 363.

⁷³ *Id.* at ¶ 720.

⁷⁴ *E.g., Local Competition First Report and Order* at ¶ 699.

regulatory bodies was recently affirmed by the Supreme Court.⁷⁵ In defining its TELRIC standard, the FCC expressly *excluded* Universal Service Subsidies from the rates that ILECs could charge for both interconnection and UNEs:

We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Section s 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services. We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate that requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252(d)(1) requires that rates for interconnection, network elements and access to network elements reflect the costs of providing those network elements, not the costs of supporting universal service.⁷⁶

* * *

If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based.... States may not, therefore, include universal service support funding in the rates for elements and services pursuant to section s 251 and 252, nor may they implement mechanisms that have the same effect.⁷⁷

These finding should be reiterated here.

⁷⁵ *AT&T Corp.* at 733.

⁷⁶ *Local Competition First Report and Order* at ¶ 712 (citations omitted).

⁷⁷ *Id.* at ¶ 713.

VII. CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully submit that the Commission adopt a nationwide list of minimum UNEs consistent with these comments. In addition, the Commission should also promulgate UNE rules consistent with the positions advocated herein.

Respectfully submitted,

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MAY 26, 1999

